

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE BOARD OF TRUSTEES, in their)	Case No. 11-3259 SC
capacities as TRUSTEES OF THE)	
CEMENT MASONS HEALTH AND WELFARE)	ORDER GRANTING APPLICATION
TRUST FUND FOR NORTHERN CA, CEMENT)	<u>FOR DEFAULT JUDGMENT</u>
MASONS PENSION TRUST FUND FOR)	
NORTHERN CA, CEMENT MASONS)	
VACATION/HOLIDAY TRUST FUND FOR)	
NORTHERN CA, CEMENT MASONS)	
APPRENTICESHIP & TRAINING TRUST,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CORE CONCRETE CONSTRUCTION, INC.,)	
)	
Defendant.)	

I. INTRODUCTION

Plaintiffs Board of Trustees ("Plaintiffs") in their capacities as Trustees of the Cement Masons Health and Welfare Trust Fund for Northern CA, Cement Masons Pension Trust Fund for Northern CA, Cement Masons Vacation/Holiday Trust Fund for Northern CA, Cement Masons Apprenticeship & Training Trust ("the Trust Funds") alleges that Defendant Core Concrete Construction, Inc. ("Defendant") failed to make timely fringe benefit contributions to the Trust Funds as required by the parties' collective bargaining agreements and trust agreements in violation of the Employee Retirement Income Security Act ("ERISA"). ECF No. 1 ("Compl.") at

1 3-5. Defendant has failed to answer Plaintiffs' Complaint or
2 otherwise enter an appearance in this matter. Now Plaintiffs seek
3 entry of Default Judgment against Defendant. ECF No. 13 ("App.").
4 For the reasons set forth below, Plaintiffs' Application is
5 GRANTED.

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7 **II. BACKGROUND**

8 Plaintiffs are the trustees of multi-employer employee benefit
9 plans, as defined by the ERISA. Compl. ¶ II. Defendant is a
10 member of the Construction Employers' Association, and by virtue of
11 such membership, became subject to the terms and conditions of the
12 Cement Masons Master Agreements ("the Agreements"). Id. ¶ III.
13 The Agreements provides for prompt payment of all contributions to
14 the Trust Funds and for the payment of interest and liquidated
15 damages for delinquent contributions. Id. ¶¶ V-VI. After
16 Defendant failed to make contributions to the Trust Funds pursuant
17 to the Agreements, Plaintiffs brought the instant action, alleging
18 breach of contract. Defendant was properly served on July 25,
19 2011, ECF No. 7 ("Proof of Service"), but has yet to enter an
20 appearance or otherwise respond to Plaintiffs' Complaint. The
21 clerk entered default on September 7, 2011. Now Plaintiffs seek
22 default judgment for \$5,039.16 in unpaid contributions, \$3,624.86
23 in interest and liquidated damages, and \$7,558.75 in attorney's
24 fees, and \$594.16 in costs. ECF No. 16 ("Proposed Order").

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1 **III. LEGAL STANDARD**

2 After entry of default, the Court may enter a default
3 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
4 so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092
5 (9th Cir. 1980), is guided by several factors. As a preliminary
6 matter, the Court must "assess the adequacy of the service of
7 process on the party against whom default judgment is requested."
8 Bd. of Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. C-00-
9 0395 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2,
10 2001). If the Court determines that service was sufficient, it
11 should consider whether the following factors support the entry of
12 default judgment: (1) the possibility of prejudice to the
13 plaintiff; (2) the merits of a plaintiff's substantive claim; (3)
14 the sufficiency of the complaint; (4) the sum of money at stake in
15 the action; (5) the possibility of a dispute concerning material
16 facts; (6) whether the default was due to excusable neglect; and
17 (7) the strong policy underlying the Federal Rules of Civil
18 Procedure favoring decisions on the merits. Eitel v. McCool, 782
19 F.2d 1470, 1471-72 (9th Cir. 1986). "The general rule of law is
20 that upon default the factual allegations of the complaint, except
21 those relating to the amount of damages, will be taken as true."
22 Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977).
23 However, "necessary facts not contained in the pleadings, and
24 claims which are legally insufficient, are not established by
25 default." Cripps v. Life Ins. Co., 980 F.2d 1261, 1267 (9th Cir.
26 1992).

1 **IV. DISCUSSION**

2 **A. Proof of Service**

3 Under Rule 4(h) of the Federal Rules of Civil Procedure, a
4 plaintiff may serve a corporate defendant "by delivering a copy of
5 the summons and of the complaint to an officer, a managing or
6 general agent, or any other agent authorized by appointment or by
7 law to receive service of process." Fed. R. Civ. P. 4(h)(1)(B).
8 Alternatively, a plaintiff may follow the state law for service of
9 process. Fed. R. Civ. P. 4(h)(1)(A). Here, Defendant's agent for
10 service of process was personally served with the summons,
11 Complaint, and other relevant documents on July 25, 2011.
12 Accordingly, the Court finds that service of process was adequate.

13 **B. Eitel Factors**

14 Applying the factors articulated by the Ninth Circuit in
15 Eitel, the Court finds the factors weigh in favor of granting
16 Plaintiffs' Application.

17 The first factor considers whether the plaintiff would suffer
18 prejudice if default judgment is not entered. See Pepsico, Inc. v.
19 California Sec. Cans, 238 F.Supp. 2d 1172, 1177 (C.D. Cal. 2002).
20 In general, where default has been entered against a defendant, a
21 plaintiff has no other alternative by which to recover damages.
22 Id. Therefore, the Court finds Plaintiffs would be prejudiced if
23 default judgment is not granted.

24 The second and third Eitel factors require that a plaintiff's
25 allegations state a claim upon which it can recover. In the
26 instant action, Plaintiffs claim that Defendant breached the
27 Agreements by failing to make timely contributions. Plaintiffs'
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1 allegations are sufficient to state a claim. Accordingly, these
2 factors weigh in favor of default judgment.

3 As to the fourth Eitel factor, the Court must consider "the
4 amount of money at stake in relation to the seriousness of
5 defendant's conduct." Bd. of Trs. of the N. Cal. Sheet Metal
6 Workers, 2000 U.S. Dist. LEXIS 19065, at *4-5. Here Plaintiffs
7 seek a total of \$16,816.93 for unpaid contributions, liquidated
8 damages, interest, and attorneys' fees. This is less than the
9 amount at stake in other cases where default judgment was deemed
10 appropriate. See Tragni v. Manzanares, No. CV 11-01173 EJD, 2011
11 U.S. Dist. LEXIS 94281, at *5 (N.D. Cal. Aug. 23, 2011) (\$94,858.81
12 deemed "modest"). Further, Plaintiffs' damages are consistent with
13 the amount owing under the Agreements. Accordingly, this factor
14 weighs in favor of the entry of default judgment.

15 With respect to the fifth Eitel factor, the material facts of
16 the instant case are not reasonably likely to be subject to
17 dispute. Plaintiffs have pled factual allegations and provided
18 declarations supporting their claims. Additionally, as the Court
19 may assume the truth of the facts pled in the Complaint (except
20 with respect to damages) after the clerk's entry of default, there
21 is no likelihood that any genuine issue of material fact exists.
22 See Geddes, 559 F.2d at 560. Defendant's failure to file an answer
23 to Plaintiffs' Complaint or submit a response to Plaintiffs' Motion
24 for Default Judgment further supports this conclusion.
25 Accordingly, this factor weighs in favor of entry of default
26 judgment.

1 As to the sixth factor, there is no support for finding that
2 Defendant's default is due to excusable neglect. Defendant was
3 served with the Complaint and summons in this action over six
4 months ago and has yet to enter an appearance. Plaintiffs also
5 served their Motion for Default Judgment on Defendant. ECF No. 17.
6 In such circumstances, default cannot be attributed to excusable
7 neglect. See Shanghai Automation Instrument Co. v. Kuei, 194 F.
8 Supp. 2d 995, 1005 (N.D. Cal. 2001). This factor supports entry of
9 default judgment.

10 The final Eitel factor, underscoring the policy favoring
11 decisions on the merits, does not save this action from default
12 judgment. This policy is not dispositive and "Defendant's failure
13 to answer Plaintiff['s] Complaint makes a decision on the merits
14 impractical, if not impossible." Pepsico, 238 F. Supp. 2d at 11.

15 **C. Damages**

16 Plaintiffs seek the award of unpaid contributions under the
17 Agreement, liquidated damages, interest, costs, and attorney's
18 fees. After reviewing Plaintiffs' Motion for Default Judgment and
19 the evidence submitted, the Court finds that the amount sought by
20 Plaintiffs is appropriate. Plaintiffs provided adequate evidence
21 supporting the amount of unpaid contributions owing under the
22 Agreements prior to the filing of the instant action, including a
23 declaration from John Hagan ("Hagan"), the accounts receivable
24 manager for the Laborers Funds Administrative Office of Northern
25 California, Inc., which provides administrative services for the
26 Cement Masons Trust Funds. ECF No. 15 ("Hagan Decl."). The Hagan
27 declaration also provides support for Plaintiffs' demand for
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1 interest and liquidated damages. Further, the fees and costs
2 requested by Plaintiffs, which are provided for by ERISA, are
3 reasonable and supported by declarations. See 29 U.S.C. §
4 1132(g)(2)(D); ECF No. 14 ("Lozano-Batista Decl.").

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6 **V. CONCLUSION**

7 Accordingly, the Court enters judgment in favor of Plaintiffs
8 Board of Trustees in their capacities as Trustees of the Cement
9 Masons Health and Welfare Trust Fund for Northern CA, Cement Masons
10 Pension Trust Fund for Northern CA, Cement Masons Vacation/Holiday
11 Trust Fund for Northern CA, Cement Masons Apprenticeship & Training
12 Trust and against Defendant Core Concrete Construction, Inc. as
13 follows:

14 1. Defendant is ordered to pay the sum of \$5,039.16 in
15 principal contributions owed to the Trust Funds for amounts self-
16 reported by Defendant for May 2010;

17 2. Defendant is ordered to pay \$1,722.70 in liquidated damages
18 and interest owed to the Trust Funds for self-reported amounts due
19 for May 2010 that were never paid;

20 3. Defendant is ordered to pay the sum of \$1,902.16 in
21 liquidated damages and interest owed to the Trust Funds as a result
22 of Defendant's delinquent payments on reported hours;

23 4. Defendant is ordered to submit to an audit of its books
24 and records by Plaintiffs from the date of January 1, 2010 forward
25 and to pay any delinquent amounts disclosed by such audit;

26 5. Defendant is ordered to pay attorneys' fees in the amount
27 of \$7,558.75; and
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1 6. Defendant is ordered to pay costs in the amount of
2 \$594.16.

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4 IT IS SO ORDERED.

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6 Dated: February 16, 2012


UNITED STATES DISTRICT JUDGE